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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

VIACOM INTERNATIONAL INC., COMEDY PARTNERS, COUNTRY MUSIC TELEVISION, INC., PARAMOUNT PICTURES CORPORATION, and BLACK ENTERTAINMENT TELEVISION LLC, Plaintiffs, v. YOUTUBE, INC., YOUTUBE, LLC, and GOOGLE INC., Defendants.	Case No. 1:07-cv-02103 (LLS) (Related Case No. 1:07-cv-03582 (LLS)) **MEMORANDUM OF LAW IN SUPPORT OF NOTICE OF MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT**

Plaintiffs Viacom International Inc., Comedy Partners, Country Music Television, Inc., Paramount Pictures Corporation, and Black Entertainment Television LLC (collectively, "Plaintiffs") move this Court for the entry of an Order, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, granting Plaintiffs leave to file an amended complaint.[1] The governing Rule 16(b) scheduling order (Dkt. 56) expressly contemplates that the parties may amend their pleadings by December 31st, 2007. Because the Courthouse was closed on that date and on January 1st, 2008, the time for filing amended pleadings was automatically extended to January 2nd, 2008. Fed. R. Civ. P. 6(a). Defendants YouTube, Inc., YouTube, LLC, and Google Inc. (collectively, "Defendants") have refused to consent to the filing of the amended complaint.

[1] For the Court's reference, Plaintiffs have attached hereto the proposed amended complaint (Exhibit 1) and a "blackline" showing the changes made in the amended complaint with respect to the March 2007 complaint (Exhibit 2).

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ARGUMENT

Leave to amend should be "freely give[n]." Fed. R. Civ. P. 15(a)(2); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). A court should not deny a timely motion to amend unless there is evidence of undue delay, undue prejudice to the defendant, bad faith, or the proposed amendment would be futile. *Foman*, 371 U.S. at 182; *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 110 (2d Cir. 2001). None of these factors are present here.

First, Defendants cannot complain that the proposed amendment is untimely or unduly delayed. Defendants agreed to the December 31st, 2007, deadline for the filing of amended pleadings in the governing Rule 16(b) scheduling order (Dkt. 56). A motion filed in compliance with a scheduling order deadline is "on its face" timely. *Halbert v. City of Sherman*, 33 F.3d 526, 529 (5th Cir. 1994). In any event, a nine-month gap between the filing of the suit and the filing of the first amended complaint is not an "undue delay." *E.g.*, *Middle Atlantic Utilities Co. v. S. M. W. Development Corp.*, 392 F.2d 380, 384 (2d Cir. 1968) (three-year delay from the filing of the initial complaint was inadequate basis for denying a motion to amend).

Second, there is no basis for the Defendants to assert they are unduly prejudiced by the proposed amendments. As explained below, any new allegations and claims in the amended complaint arise directly from the facts alleged and claims asserted in the original complaint. Defendants have thus had full and fair notice of the nature of Plaintiffs' claims and the grounds upon which these claims rest.

A. Distribution Claim: The complaint alleged that YouTube and its users infringe the Plaintiffs' exclusive rights to perform, display, and reproduce their copyrighted works. Since filing the complaint, Plaintiffs have become aware that in the process of performing and displaying works to users, Defendants also distribute full copies of these works to users' computers. The distribution claim added by the amended complaint thus relates directly to the conduct alleged in the original complaint.

B. Punitive Damages: The complaint stated that at Plaintiffs' election, Plaintiffs would be entitled to recover their actual damages plus Defendants' profits from infringement. The complaint also alleged that the Defendants' actions were willful, intentional, and purposeful. The amended complaint makes clear that if Plaintiffs elect to recover actual damages and profits rather than statutory damages, Plaintiffs may also claim punitive damages for Defendants' conduct. Such an amendment is proper. *Blanch v. Koons*, 329 F. Supp. 2d 568, 570 (S.D.N.Y. 2004) (Stanton, J.) (granting motion to amend complaint to seek punitive damages in copyright infringement suit).

C. Jury Demand: The amended complaint demands a jury trial. This demand cannot impose prejudice on the Defendants, who demanded a jury trial on "all issues" triable to a jury in their answer. *Dell'Orfano v. Romano*, 962 F.2d 199, 202 (2d Cir. 1992) ("A plaintiff is entitled to rely on a defendant's jury demand to preserve his own right to a jury trial …."); Fed. R. Civ. P. 38(d) ("A proper demand may be withdrawn only if the parties consent.").

Third, the proposed amendments to the complaint are being made in good faith and without any dilatory motive. Under the discovery plan worked out between the parties, the parties have already established a schedule for producing and exchanging all the information necessary to litigate the new allegations and claims. Defendants remain free to argue at the appropriate time that the discovery plan should be modified given the contents of the amended complaint – a request that Plaintiffs will oppose in due course because the amendments to the complaint present no basis for modification of the agreed-upon timeline.

Finally, there is no colorable argument that Plaintiffs' proposed amendments are futile. The amended complaint contains a short and plain statement of the facts underlying the Plaintiffs' distribution claim, Fed. R. Civ. P. 8, and properly requests punitive damages, *Blanch*, 329 F. Supp. 2d at 570, and a jury trial, Fed. R. Civ. P. 38.

The Court should therefore grant Plaintiffs' timely motion to file the amended complaint.

January 2, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan J. Kohlmann, hereby certify that on February 8, 2008 I served the foregoing **Memorandum of Law in Support of Notice of Motion for Leave to File First Amended Complaint, Exhibits thereto, and Proposed Order** upon all counsel in this action action via the Court's electronic case filing system:

Respectfully submitted,

Viacom International Inc., Comedy Partners, Country Music Television, Inc., Paramount Pictures Corporation, and Black Entertainment Television LLC

s/ Susan J. Kohlmann

Attorney for Plaintiffs.